Supreme Court of the United States

OCTOBER TERM, [redacted]

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA, *Appellees*.

On Appeal From the District Court for the State of Alaska

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

RICHARD SCHIFTER
1700 K Street, N. W.
Washington 6, D. C.

THEODORE H. LITTLE
817-6th Street
Clarkston, Washington

Attorneys for Appellant

Of Counsel

DANIEL M. SINGER
STRASSER, SPIEGELBERG, FRIED & FRANK

PETER OF BYRON S. ADAMS, WASHINGTON, D. C.

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I.

APPELLEES' SUGGESTION OF MOOTNESS IS FOUNDED ON A MISUNDERSTANDING OF THE APPLICABLE LEGAL PRINCIPLES.

Appellees' motion is based, for all practical purposes, on a single contention, namely that the "real issues of this litigation are moot." (Appellees' Brief, page 6.) Analysis of this contention demonstrates that appellees have misunderstood the fundamental

issues of this case and have, as a result, misapplied the doctrine of mootness.

To decide whether the case is moot, its present posture must be determined. The court below, on appellees' motion prior to answer, dismissed appellant's complaint. The relevant well-pleaded allegations of that complaint, unaffected in any way by subsequent intervening events, are as follows:

(1) Appellant is an Indian community, residing on the Annette Island Reserve, an area granted it by Congress in 1891. (Complaint, II(b); R. 8.)

(2) By Presidential proclamation, 39 Stat. 1777 (1916), appellant was given the exclusive right to fish to a distance of 3000 feet from the shore of the Annette Island reserve at mean low tide. (Complaint, II(e); R. 9.)

(3) Section 4 of the Alaska Statehood Act provides that the "State and its people . . . forever disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to which may be held by any Indians . . . or is held by the United States for said [Indians]; that all such lands or other property . . . shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority. . . ." 72 Stat. 339 (1958). (Complaint, II(i); R. 11-12.)

(4) Appellant asserts the right to fish in the area of its exclusive jurisdiction subject to Federal regulation only. It has fished and will continue to fish by fish traps. Appellant is economically dependent on its right to continue to do so. (Complaint, IV-IX; 13-15.)

(5) Appellees have asserted the power, under State law, Session Laws of Alaska, Chs. 17, 95 (1959), to regulate appellant's fishing rights, to countermand Federal regulations, and to invoke State criminal sanctions against appellant's agents even though the latter are acting in conformity with Federal regulations. (Complaint, XII; R. 17.)

(6) Appellees' threatened action is in violation of the laws of the United States, most specifically of Section 4 of the Alaska Statehood Act. (Complaint, XIV; R. 18-19.)

In summary, it is appellant's claim that until Congress takes further action pursuant to Section 4 of the Alaska Statehood Act, the Metlakatlans' right to fish in the area set aside for them is subject to Federal regulation only, and that any effort by the State to regulate that right is illegal and should be enjoined.

In suggesting that this case is moot, appellees rely on the fact that Federal regulations governing Indian fishing in Alaska have, in the past, been issued annually, that the regulations for the 1959 season no longer have any force because the season is over, and that no regulations for the coming year have as yet been published. They also argue that the authority of the Federal Government to protect *all* fisheries and wildlife in Alaska expires on January 1, 1960, pursuant to Section 6(e) of the Alaska Statehood Act, 72 Stat. 340 (1958). But all that is beside the point. It is not the exercise of *Federal* authority that is here sought to be enjoined. This injunctive proceeding is directed against the *State* and can be rendered moot only if the State ceases to interfere with appellant's

right to fish[1] or if Congress grants the State the power which it now lacks to regulate Indian fishing rights.

In granting a stay in this case, Mr. Justice Brennan stated that one of the questions on which review will be sought was the following:

> "Is § 4 of the Alaska Statehood Act and Art. 12, § 12 of the Alaska Constitution a permanent disclaimer by the State of Alaska of control over Indian fishing within the State, and, if so, is § 4 of the Statehood Act an assumption of permanent jurisdiction by the Federal Government over the location and manner of Indians' fishing within the State?"[2] Opinion of Mr. Justice Brennan, Circuit Justice, on appellant's motion for stay, 80 Sup. Ct. , (1959).

This, then, is the question before the Court. It is a live, justiciable question. Just what Federal regulations are in effect at any particular time is irrelevant.

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[1] Despite Section 4 of the Alaska Statehood Act, appellees continue to assert jurisdiction over appellant. See proposed regulations of the Alaska State Board of Fish and Game (reproduced in part in Appendix, *infra*, at 4a-6a). The proposed regulations purport to be issued pursuant to Chapter 94, Section 6, Session Laws of Alaska (1959). The regulations purport to be applicable to appellant, see § 101.1(*l*), and to require appellant, *inter alia*, to procure a commercial fishing license, § 102.1, and to register, § 102.2. Such assertions of "power to regulate fishing by Indians in their own reservation," are in clear violation of the reservation to the United States of "absolute jurisdiction and control" contained in Section 4 of the Alaska Statehood Act. See *Tulee* v. *State of Washington*, 315 U.S. 681, 683 (1942), where this Court on appeal held invalid an attempt by the State of Washington to charge the Indians a fishing license fee, even where the Indians' right to fish was to be exercised in common with the citizens of the State.

[2] The question of whether the jurisdiction of the State is limited by Section 6(e) of the Alaska Statehood Act is admittedly moot.

The key issue raised by the pleadings is that the State lacks the power to regulate. It lacks that power irrespective of the action of the Executive branch of the Federal Government. Until Congress acts to vest jurisdiction in the State, the latter is simply excluded from this area of law enforcement. Cf. *Williams* v. *Lee,* 358 U.S. 217 (1959).

An appeal may be dismissed as moot if the alleged illegal activity has been discontinued and there is a bona fide intention not to resume the wrongful acts, *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419, 421 (1945); *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633 (1953); or if, pending review, something occurs which renders it impossible to grant the plaintiff effectual relief, *Jones* v. *Montague,* 194 U.S. 147, 152 (1904); *Richardson* v. *McChesney,* 218 U.S. 487, 492 (1910). Neither rule would govern this case. The fish are expected to reach Annette Island by the time of the 1960 season, appellant expects to operate its fish traps, and appellees will interfere with appellant's fishing operation. This case is thus clearly ripe for judicial determination.

Beyond these legal considerations, there is serious doubt whether appellees have correctly analyzed the facts. Appellees have asserted most emphatically that the regulations issued on March 7, 1959 apply to the 1959 fishing season only. A close reading of these regulations, however, casts doubt on the correctness of this assertion. In his statement of "Basis and Purpose," preceding the actual text of the regulations, the Secretary of the Interior states the following (24 Fed. Reg. 2054, Mar. 19, 1959):

> "It has been determined that the use of fish traps as a means of taking salmon in Alaskan

> waters shall be permitted only at not to exceed the eight sites customarily operated within the Annette Island Fishery Reserve; not to exceed the nine sites customarily operated by the organized Village of Kake; and not to exceed the four sites customarily operated by the Angoon Community Association. Within the limitations stated, *the number of Indian traps to be permitted to operate will be determined from time to time by the Secretary of the Interior.* Because of the relatively poor salmon runs expected in Southeastern Alaska during the 1959 cycle, and the need for insuring the escapement of adequate spawning stocks, it has been determined that only eleven of the twenty-one Indian traps can be permitted to operate *during the 1959 season."* [Emphasis added.]

It is respectfully submitted that the foregoing statement, while indicating what the Secretary planned to do in 1959, is also a statement of a continuing policy, namely to permit the operation of not to exceed twenty-one Indian fish traps, the exact figure to be determined annually.

Even if the fact that the Federal fishing regulations are annual in nature had any relevance to this case, it would not render the case moot. As was pointed out in *United States* v. *W. T. Grant Co., supra,* "a dispute of the legality of the challenged practices," combined with "a public interest in having the legality of the practices settled, militates against a mootness conclusion." *Id.* at 632. And in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498 (1911), the Court observed:

> "[T]he questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar)

> and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government, and at another time the carriers have their rights determined by the Commission without a chance of redress." *Id.* at 515.

In the instant case the Interior Department has clearly asserted its right to continue to regulate Indian fishing in Alaska. On March 10, 1959 the Acting Secretary of the Interior wrote to the Alaska Area Director:

> "As you know, under section 4 of the act of July 7, 1958 (72 Stat. 339) the State of Alaska disclaimed jurisdiction over any lands or other property, including fishing rights, held by any Indians, Eskimos, or Aleuts, or which is held by the United States in trust for them, and recognized continuing federal authority thereover. This disclaimer, coupled with the longstanding supervisory control exercised for the protection of the interests of Indians, Eskimos, and Aleuts by the Department of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of fish traps by Indian tribes or villages. The Secretary will continue to control the operation of traps by Indian tribes and villages." Appendix herein at 1a.

To provide the flexibility which proper conservation practices demand, Federal regulations concerning the use of fish traps are issued annually. If that fact were to render this case moot, the basic question here involved could never be determined by this Court, as the fishing season follows the issuance of regulations so closely that it would invariably be over by the time the

case reaches the Supreme Court of the United States.[3] This is the very situation against which this Court guarded by rejecting a suggestion of mootness in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, supra.*

II.

THE DISTRICT COURT'S FAILURE TO APPLY SECTION 4 OF THE ALASKA STATEHOOD ACT TO UPHOLD THE AUTHORITY OF THE SECRETARY OF THE INTERIOR RAISES A SUBSTANTIAL QUESTION.

A. The Secretary of the Interior Has Acted and Will Continue to Act Under Section 4 of the Alaska Statehood Act. Appellant Has Asserted Its Rights Under That Section.

In their motion, appellees, rather than trying to meet any argument arising out of Section 4 of the Alaska Statehood Act, attempt to sweep it aside. The court below followed a similar policy.

Appellees contend that appellant was in error when it asserted that the Secretary of the Interior interprets Section 4 as giving him authority over appellant's commercial fishing activities. This Court, appellees say, "should not unnecessarily speculate as to whether or not in the future any claim to a Federal right can be made under Section 4" of the Alaska Statehood Act. (Appellees' Brief, page 6.)

In advancing their contention appellees rely largely on what they claim to be the statement of the authority of the Secretary of the Interior, "as required by the Administrative Procedure Act," contained in the regulations of March 7, 1959. They assert that that state-

[3] In all likelihood it shall never again be possible to reach this Court as quickly as was possible in this case, since an appeal lay directly from the trial court to the Supreme Court of the United States.

ment "clearly claims [the Secretary's] authority for his regulations as being the White Act and § 6(e) of the Statehood Act, not § 4 of the Statehood Act." (Appellees' Brief, page 13.)

The fact of the matter is that the Statement of Authority "as required by the Administrative Procedure Act," which appears following Part 101 of the regulations, 24 Fed. Reg. 2054, reads as follows:

> "AUTHORITY: §§ 101.1 to 101.22 issued under sec. 1, 43 Stat. 464, as amended; 48 U.S.C. 221."[4]

The only question that could arise is what the words "as amended" mean. Do they encompass Section 4 of the Statehood Act? Appellees say they do not, that they refer only to Section 6(e). In support of this assertion they seem to rely exclusively on the narrative statement of policy which precedes the regulations. That statement discusses the regulations in a general way and explains that the entire range of regulations, concerning non-Indians as well as Indians, were continued in effect under Section 6(e). A mere reading of the text makes it clear that the statement does not purport to be all-inclusive, nor does it purport to be a statement of authority under the Administrative Procedure Act.

The fact of the matter is that on March 10, 1959, almost contemporaneous with the publication of the regulations, the Secretary wrote to the Alaska Area Director that the disclaimer under Section 4 "coupled with the longstanding supervisory control exercised for the protection of the interests of the Indians, Es-

[4] This statement is repeated an additional fourteen times throughout the regulations, with appropriate changes of the references to sections of the regulations.

kimos and Aleuts by the Departments of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of fish traps by Indian tribes or villages." Appendix herein at 1a. On May 29, 1959 he advised appellee Egan to the same effect:

> "Supplementing my letter of May twentyeight the following telegram has today been sent to Mayor Littlefield of Metlakatla Quote In reply to your telegram of May twentyseven the Department of the Interior has not changed its position with respect to the status of Indian owned fish traps. *It is our view that Section Four of the Alaska Statehood Act recognizes and protects Indian fishing rights and reserves absolute jurisdiction in the United States over them until disposed of under Federal authority.* Sections 102.10 and 115.26 of the revised regulations for Alaska Commercial Fisheries for 1959 were adopted in conformity with existing laws and we know of no reason to amend or modify these sections which now permit operation of native Indian owned fish traps Unquote
>
> "Will discuss matter at your convenience. Please advise." Appendix herein at 2a. [Emphasis added.]

That the Secretary could not have issued his regulations concerning Indian fish traps if it were not for Section 4 is further established if this Court's decision in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949), is kept in mind. In that case this Court held that under the White Act, 43 Stat. 464 (1924), as amended, 48 U.S.C. §§ 221, 222, the Secretary may not grant fishing privileges in a manner which would favor Indians. Clearly the Secretary must have thought that the White Act had been amended to permit such discrimi-

nation. And when he was challenged on that question in *Ketchikan Packing Co.* v. *Seaton*, 267 F. 2d 660 (D.C. Cir. 1959), this is exactly what he told the Court of Appeals. As can be seen from Secretary Seaton's brief in the Court of Appeals in the *Ketchikan* case (see Appendix herein at 3a-4a), the Secretary clearly and unmistakably relied on the assumption that his authority stemmed from the White Act *as amended by Section 4 of the Alaska Statehood Act.*

The words "as amended," as they appear in the statement of authority in the regulations must, therefore, be construed to include Section 4 of the Alaska Statehood Act.

B. Section 4 of the Alaska Statehood Act Protects the Rights of Appellant Which Are Here Asserted.

Once it is recognized that the Secretary has acted under Section 4 of the Alaska Statehood Act, we reach the question of whether he interpreted Section 4 correctly. As shown by the regulations, he construed the law as permitting him to authorize trap fishing, the laws of the State of Alaska to the contrary notwithstanding.

It has been held that the Secretary's interpretation of the powers conferred upon him "is entitled to considerable weight." *Ketchikan Packing Company* v. *Seaton, supra,* 267 F. 2d at 663. When such an interpretation is held incorrect by the courts, this may in itself raise a substantial question. Beyond that, however, it can be shown that the Secretary was indeed correct.

Appellees suggest that appellant has conceded that before it has a substantial Federal right pursuant to Section 4, there must be additional legislation. This

is most certainly *not* the case. Section 4 quite plainly preserved the rights that existed prior to statehood. Its very purpose was to avoid judicial construction of the Statehood Act as wiping out native rights, such as occurred in *Ward* v. *Race Horse,* 163 U.S. 504 (1896). Yet the Court below relied rather heavily on the *Race Horse* case. (174 F. Supp. 500, at 503; R. 187.) Such reliance was clearly erroneous.

Appellant's rights derive from the act creating the Annette Island Reserve, 26 Stat. 1095, 1101 (1891), 48 U.S.C. § 358. Those rights were recognized by this Court in *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918), and expanded by Presidential Proclamation, 39 Stat. 1777 (1916). The latter Proclamation reserves a specified area for the Metlakatlans "to be used by them under the general fisheries laws and regulations of the United States." *Id.* at 1778. That is the specific right which Section 4 preserved.

C. Section 4 of the Alaska Statehood Act Is Constitutional.

As Mr. Justice Brennan has pointed out, this Court will, if it construes Section 4 of the Alaska Statehood Act to uphold the Indians' right to fish with traps, have to reach the issue of the constitutionality of that section under the so-called "equal footing" doctrine. If the opinion of the Court below is interpreted as holding that Section 4 may violate the "equal footing" doctrine, such holding is clearly erroneous and also raises a substantial question.

Appellees have contended that if Section 4 restricts the powers or sovereignty of the State of Alaska it is unconstitutional because Alaska is entitled to be admitted "on the same footing" as the other states. As

will here be shown, the doctrine that a compact between a State and the Federal Government limiting future State sovereignty is void applies only where there is no independent authority for such limitation in the Constitution. It will further be shown that such independent Constitutional authority exists in the instant case.

That a limitation based on the Constitution defeats the "equal footing" doctrine is clear even from a cursory reading of the cases relied on by appellees. In *Pollard* v. *Hagan,* 44 U.S. (3 How.) 212 (1845), the Court said:

> "[I]f an express stipulation had been inserted in the agreement [to admit Alabama as a state], granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because, the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, *except in the cases in which it is expressly granted." Id.* at 223. [Emphasis added.]

And in *Coyle* v. *Smith,* 221 U.S. 559 (1911), the Court expounded further on this proposition:

> "In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the State; second, between compacts or affirmative legislation intended to operate *in futuro,* which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new States in respect of matters which would otherwise be exclu-

> sively within the sphere of state power." *Id.* at 568.

As an example of cases falling into the second class, the Court pointed out:

> "[S]tipulations . . . in respect to the control by the United States of the large Indian reservations and Indian population of the new State, are found in the Oklahoma enabling act. Whatever force such provisions have after the admission of the State may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the state." *Id.* at 570.

Thus the Court has explained that it is not the character of the limitation as a compact or agreement that is controlling. What is vital is whether Congress has authority to legislate in this area.

The power of Congress to legislate in the field of Indian affairs stems from the clause in the Constitution permitting Congress to regulate commerce with the Indian tribes, Article I, Section 8, Clause 3. That power has been described as "Plenary," *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565 (1903), and as "paramount and of a most sweeping character." *People* ex rel. *Ray* v. *Martin,* 294 N.Y. 61, 60 N.E. 2d 541, 545 (1945), *aff'd,* 326 U.S. 496 (1946). It has been recognized as a limitation of the rights of states to apply their criminal laws in the Indian country in a long line of cases from *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), to *Williams* v. *Lee, supra.* As this Court said in the latter case:

> "[W]hen Congress has wished the States to exercise . . . power [over Indians] it has expressly

granted them the jurisdiction which *Worcester* v. *Georgia* had denied.'"[5] *Id.* at 221.

It is thus clear that the regulation of Indian fishing rights is a matter under Federal jurisdiction and that such jurisdiction is exercised under the Indian commerce clause. It follows that Congress clearly had the power to enact Section 4 of the Alaska Statehood Act.

WHEREFORE, on the basis of the foregoing, appellant prays that appellees' motion to dismiss or affirm be denied, and that this Court note probable jurisdiction.

Respectfully submitted,

RICHARD SCHIFTER
THEODORE H. LITTLE
Attorneys for Appellant

Of Counsel:

DANIEL M. SINGER
STRASSER, SPIEGELBERG, FRIED & FRANK

Dated: November 13, 1959

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[5] Express disclaimers are contained in the Statehood Acts admitting Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota and Washington. Typical is the disclaimer provision in Section 4 of the Act admitting South Dakota, North Dakota, Montana and Washington, 25 Stat. 676, 677 (1889), which declares:

"And said [state constitutional] conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of the said States:

". . .

"Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, *the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States* . . . ." [Emphasis added.]

This language is virtually identical with the language in Section 4 of the Alaska Statehood Act.